RECENT CASES.

AGENCY — LIABILITY FOR TORT — FAILURE OF SERVANT TO COMPLY WITH STATUTE. — A statute of New York provides that any railroad engineer who fails to ring the bell or sound the whistle of his locomotive eighty rods before crossing a highway shall be guilty of a misdemeanor. *Held*, that a charge to the jury was erroneous which laid down as a rule of law that failure on the part of defendant's engineer to comply with the statute made the defendant liable to a plaintiff injured thereby. *Vandewater* v. *N. Y. & N. E. R. R. Co.*, 32 N. E. Rep. 636 (N. Y.).

The court say that as the statute imposed a duty on the servant only, his failure to comply did not *per se* make the master liable. It is submitted, however, that this is beside the mark. Failure to comply with the statute undoubtedly made the servant personally liable as for negligence; and the servant was at the time engaged upon his master's employment. The company was of course not liable as for its own negligence, because no statutory duty was imposed on it; but it was liable, because responsible for the acts of its servant.

AGENCY — MISCONDUCT OF AGENT — RIGHTS OF THIRD PERSONS — NOTICE. — A principal in New York supplied his agent with large sums of money, which the agent in Maryland deposited with the defendant bank in his own name as agent. This money was properly used in making loans upon canned goods, of which he took storage receipts in his own name as agent, but which he pledged with the defendant for his personal benefit. *Held*, that the knowledge of the bank of the general relations between the principal and his agent, coupled with the use of the word "agent" on the receipts, was sufficient to put the bank upon inquiry, and that it was liable to the principal for the amount realized from the sale of the goods pledged. The agent also purchased goods with money received by sale of plaintiff's goods, and took storage receipts of the same in his name as agent, and obtained loans upon them for his personal benefit. *Held*, that as the agent had never intended the principal to have these goods, the title was never in the principal, and that the bank was not liable for the amounts advanced on them. *Thurber* v. *Cecil National Bank*, 52 Fed. Rep. 513 (C. Ct. Maryland).

This decision appears to be correct on principle, although the reason for the second point is highly technical.

BILLS AND NOTES — ANOMALOUS INDORSERS — EXTRINSIC EVIDENCE. — Where a note was made by a corporation, and before delivery the directors signed their names on the back, adding the words "Board of Directors," — *held*, that between the original parties and any holder having notice of the circumstances, extrinsic evidence was admissible to show that it was the understanding of the parties that the directors by their indorsement incurred no personal liability, but merely bound the corporation. *Kline* v. *Bank of Tescott*, 31 Pac. Rep. 688 (Kansas).

For the authorities on this question, which are somewhat in conflict, see Daniel, Negotiable Instruments, § 418. The following are in accord with the principal case: 32 Md. 327; 4 Col. 90; 7 Hun, 367; 49 Mo. 314; 5 Wheat. 336; 66 Cal. 451. But see, *contra*, 17 Ohio St. 125; 9 N. Y. 571.

CONFLICT OF LAWS — EXEMPTION OF DEBTOR — PROPERTY IN ANOTHER STATE. — Where a creditor and a debtor are residents of the same State, a court of equity of that State will restrain the creditor from proceeding in the court of another State to reach by garnishment credits due the debtor there, such credits being exempt from legal process by the laws of the first State, but not by the laws of the second State. *Allen* v. *Buchanan*, 11 So. Rep. 377 (Ala.).

It is usually held in this country that if a creditor is trying to evade the laws of his domicile he will be restrained, — as where a debt is due his debtor from a corporation having an existence in both States. *Keyser* v. *Rice*, 47 Md. 203; *Snook* v. *Swetzer*, 25 Ohio St. 516. The doctrine is commonly stated broadly as in the principal case; but if the property were chattels having an actual *situs* in a foreign State, it is hard to see on what theory a court of equity could interfere. It would really be enforcing the exemption laws of its own State in a foreign State.

CONSTITUTIONAL LAW — ESTATE BY CURTESY — ABOLITION BY LEGISLATURE. — *Held*, (1) that under the Illinois Married Women's Act of 1861, which provided that the lands of married women and all the rents and profits thereof should remain their separate property, under their sole control, and not subject to the husband's control or liable for his debts, the estate of tenancy by the curtesy initiate became a mere expectancy, instead of being, as at common law, a vested estate. (2) Therefore the Dower

Act of 1874, which abolished the estate of curtesy, is constitutional as applied to those who, at the time of its passage, had only an estate by the curtesy initiate under the Act of 1861. *McNeer* v. *McNeer*, 32 N. E. Rep. 681 (Ill.).

The court treats this statutory curtesy initiate as analogous to dower, which it is well settled may be abolished by statute. Cooley, Const. Limit. (6th ed.) 441, and cases there cited.

CONSTITUTIONAL LAW — POWER OF LEGISLATURE TO GRANT SOIL UNDER HARBOR. — By Act of 1869, the Legislature of Illinois granted in fee to the Illinois Central R. Co. the submerged lands, being the bed of Lake Michigan, for a mile from the shore between certain points, "Provided that nothing herein contained shall authorize obstructions to Chicago harbor or impair the public right of navigation, nor shall exempt grantee, its lessees or assigns, from any law regulating rates of wharfage in said harbor." The land thus granted comprised a large part of the harbor of Chicago. *Held*, that this was a grant which the Legislature had no power to make. The lands under navigable waters of the State belong to the State in trust for the public, and the Legislature is bound by this trust. Shiras, Gray, and Brown, JJ., *dissented*. *Illinois Central R. R. Co.* v. *State of Illinois*, 13 Sup. Ct. Rep. 110.

The court admits that small portions of lands under navigable waters may be granted to individuals for wharfage purposes, etc.; but it says that a grant of one thousand acres, as in this case, — a grant which gives virtually the whole harbor of a great city, — is beyond the power of any Legislature. The right of control over this harbor is of too vital importance to the people generally to be a subject of bargain and sale by the Legislature. The same principle is at the bottom of this decision as of those in which the Legislature is denied the power to grant away its right to protect the public health and morals.

CONTRACTS — CONSPIRACY — ACTION TO RECOVER MONEY PAID ON AN ILLEGAL CONTRACT. — At the trial it appeared upon the plaintiff's own case that the money sought to be recovered had been paid by him in pursuance of an agreement with one of the defendants, by which the latter was with the money to purchase upon the Stock Exchange a number of shares in a projected company, with the sole object of inducing the public to believe that there was a real market for the shares, and that they were at a real premium, — whereas, in fact, as the plaintiff and defendants well knew, they were not. *Held*, that such an agreement was an illegal transaction, which might be made the subject of an indictment for conspiracy, and that this action, based on such an illegal contract, could not be maintained. *Scott* v. *Brown, Dowing, McNab, & Co.; Slaughter & May* v. *Brown, Dowing, McNab, & Co.*, [1892] 2 Q. B. 724 (Eng.).

CONTRACT — PARENT AND CHILD — PRESUMPTION AS TO NATURE OF CHILD'S SERVICES. — In an action by a son against his mother's estate to recover for services rendered her by him while living with her after his majority, — *held* (three judges dissenting), that it was error to charge the jury that there was a presumption of law in favor of the services being gratuitous. *Ulrich* v. *Ulrich*, 32 N. E. Rep. 606 (N. Y.).

By presumption of law, both courts understood a presumption of mixed law and fact, — an inference which the jury are by law obliged to make, but which is rebuttable. So far as it is possible to extract any definite rule from the books, this case seems to be against the trend of authority. It would seem: (1) that from the mere fact of benefit received by the parent, the law will never raise a quasi-contract — a promise implied *in law* — to pay; nor (2) will the mere fact of benefit received be evidence of a contract implied in fact, — an actual mutual understanding, though not formally expressed, that there shall be compensation; (3) it seems to be held in some courts (see *Mosteller's Appeal*, 30 Pa. St. 473) that even a contract implied in fact will not be sustained, and that there must be proof of an express contract; (4) where the child sets up an express contract, it would seem (though the language of the cases is vague) that he has not only to sustain the burden of establishing his case, but must meet an initial presumption against him. Whether this ought to go as far as a mixed presumption of fact and law, — *i. e.*, whether the principal case does not lay down the better rule, — *quære*. See Schouler on Dom. Rel., §§ 269, 274.

CONTRACTS — PUBLIC POLICY — AGREEMENT NOT TO CHARGE FRAUD. — An agreement contained in a building contract that the architect's certificates and awards shall be final and shall not be objected to for fraud, is binding, and cannot be overturned for fraud on the part of the architect, where it does not appear that the other party to the contract was colluding with him. *Tullis* v. *Jacson*, [1892] 3 Ch. 441 (Eng.).

The court considers such a contract neither unfair nor against public policy, saying that men's right to make and enforce such contracts as they see fit ought not to be violated save for weighty reasons, and that the increasing stringency of building contracts

indicates the opinion of those conversant with the matter that it is better to run the risk of unfairness than of dispute.

CONTRACTS — RESTRAINT OF TRADE — LIMITATION AS TO TIME OR SPACE — REASONABLENESS. — *Held*, that where a covenant in restraint of trade is general, — that is, without any qualification, — it is bad, as being unreasonable and contrary to public policy; but where it is subject to a qualification of either time or space, and so only partial, then the question is whether it is reasonable, and if reasonable, it is good in law. *Held*, accordingly, that a contract by the defendants with the plaintiff corporation, which carried on a business consisting of the manufacture and sale of dye products, with branches and agents throughout the world, that after leaving the plaintiff's employ as agents, the defendants would "not enter into any like or similar business, nor start a business of that kind themselves, nor give information of any kind about the business" for three years, was good, and enforceable in equity. *Badische Anilin und Soda Fabrik* v. *Schott, Segner, & Co.*, [1892] 3 Ch. 447 (Eng.).

Compare *Oliver* v. *Gilmore*, *infra*, where a contract no broader than this between parties occupying a different relation to each other was held bad.

CONTRACTS — RESTRAINT OF TRADE — PUBLIC POLICY. — *Held*, that a contract between manufacturers, whereby the first party agrees, in consideration of a percentage on the sales made by the second party, not to use his plant for the production of strap and "T" hinges for five years, the contract to be void in case the second party increase his facilities for the production of such hinges, is void, as against public policy. *Oliver* v. *Gilmore*, 52 Fed. Rep. 562 (Mass.).

Compare the English case of *Badische Anilin und Soda Fabrik* v. *Schott, Segner, & Co.*, *supra*, where an equally broad contract between parties occupying a different relation from the parties in this case was held good.

CORPORATIONS — DISCRIMINATING CONTRACTS — PUBLIC EMPLOYMENT. — *Held*, (1) That the passage by a corporation of a by-law forbidding its members from dealing with a certain person gives no right of relief to the latter, since contracts in restraint of trade are illegal only in the sense that the court will not enforce them. (2) That the fact that the business at certain stock-yards is so large that it exercises an influence over the business of the whole country does not justify *the courts* in declaring such business public, and in applying different rules to its conduct than are applied elsewhere in similar business. *Am. Live Stock Com. Co.* v. *Chic. Live Stock Exchange*, 32 N. E. Rep. 274 (Ill.).

On the second point the court distinguishes *Munn* v. *Illinois*, 94 U. S. 113, on the ground that in that case the question was whether the *Legislature* had power to declare a certain business to be of sufficient public importance to warrant the putting of it under public control. The court in the principal case say that this is a question of public policy which the Legislature, not the court, is to settle.

The case of *N. Y. & Chic. Grain Exchange* v. *Board of Trade*, 127 Ill. 153, is distinguished, on the ground that there the corporation had voluntarily assumed the performance of certain duties towards the public at large, and in so far the interests of the public could be protected.

CORPORATIONS — NEGOTIABILITY OF STOCK CERTIFICATES INDORSED IN BLANK — ESTOPPEL BY NEGLIGENCE. — R bought stock certificates indorsed in blank, and placed them in his safety deposit box. W, who used the box in common with R, and had access to it, stole the stock and sold it to L, an innocent purchaser for value. *Held*, that certificates of stock were not negotiable instruments; that therefore the ordinary rule as to stolen property applied, and L took no title; and that under the circumstance, R's act in leaving the stock indorsed in blank was not so negligent as to raise an equity against him in behalf of L, who had suffered as a result of his act. *Bangor Electric, &c. Co. et al.* v. *Robinson et al.*, 52 Fed. Rep. 520 (C. Ct. Mass.).

Daniel on Negotiable Instruments (4th ed.), §§ 1708, 1709, is cited with approval on the question of the non-negotiability of stolen certificates of stock indorsed in blank. There is very little authority in this country on this point.

CRIMINAL LAW — RIGHT OF ACCUSED TO CHALLENGE JURORS. — In a capital case the judge directed that two lists of the panel of jurors should be made out and given to the respective parties, each of whom was required to challenge, without knowing what persons were challenged by the other side. On defendant's exception to this order, *held*, that it was reversible error, because in a capital case it is the defendant's right to be confronted with the panel of jurors, and to have all challenges made in his presence. Brewer, J., *dissented*, on the ground that there was nothing in the record to show that defendant was not present when the challenges were made. *Lewis* v. *United States*, 13 Sup. Ct. Rep. 136.

Shiras, J., who delivered the opinion, laid great stress on the right of defendant to be present at every step in the proceedings after indictment found. He said that the record did not show affirmatively that defendant was present at the challenging, and therefore the court would set the judgment aside.

EVIDENCE — DECLARATIONS OF DECEASED SHOWING STATE OF MIND OR INTENTION. — *Held*, that in a trial for murder by poisoning, evidence that the deceased at different times within a short time of his death and before his last sickness threatened to commit suicide is incompetent, as hearsay. *Siebert* v. *People*, 32 N. E. Rep. 431 (Ill.).

This decision, handed down on Oct. 31, 1892, follows with approval *Commonwealth* v. *Felch*, 132 Mass. 22, in ignorance of the fact that that case had been overruled less than a fortnight before. See *Commonwealth* v. *Trefethen*, 32 N. E. Rep. 961 (Oct. 20, 1892); and 6 Harvard Law Review, 266.

EVIDENCE — HYPOTHETICAL OPINION AS TO VALUE OF LAND. — In an action for damages by an abutting owner against a street railway company for failure to build a railway past plaintiff's land according to agreement, *held*, that opinion evidence was admissible to show what the value of the plaintiff's land would have been if the contract had been performed. *Blagen* v. *Thompson*, 31 Pac. Rep. 647 (Oregon).

This is in accord with the weight of authority; but in New York an opposite rule obtains. See 128 N. Y. 455.

HUSBAND AND WIFE — PRESUMPTION OF SURVIVORSHIP IN PERSONALTY. — A and his wife each invested $3,000 in a bond and mortgage executed to them jointly. On A's death, *held*, that no presumption arose that either intended a gift to the other, and consequently that they took as tenants in common and without survivorship. *In re Albrecht's Estate*, 32 N. E. Rep. (N. Y.).

In purchases of realty, it has been held in New York that there is a contrary, but very slight, presumption; namely, that a tenancy by the entirety is intended. (See 92 N. Y. 152; 133 N. Y. 308.) The present decision seems sensible wherever married women have the same rights in regard to their property as though sole; but the only other case on the point appears to be 35 Mich. 425.

PARTNERSHIP — INCOMING PARTNER — RIGHTS OF PREVIOUS FIRM CREDITORS. — C was admitted to the firm of A, B, & Co. He brought no new capital into the firm, and it was tacitly assumed that the firm assets and liabilities were to continue unchanged. The firm in its new form, being insolvent, made an assignment, giving preferences to a debt incurred before C entered the firm. *Held*, that the assignment was valid; for, as regards creditors, firm property belongs to the firm as an entity, and the firm creditors' right to priority in payment from this fund is unaffected by a mere change in the *personnel* of the firm. *Peyser* v. *Myers*, 32 N. E. Rep. 699 (N. Y.).

The court treats the firm as existing as one distinct entity throughout, and holds that it is unnecessary to show either that there was a novation at C's entrance, or that the firm, with C as a member, made a promise for the benefit of creditors of the old firm (*Lawrence* v. *Fox*, 20 N. Y. 268). The case is weakened as an authority by the fact that the firm, unknown to itself, was insolvent when C became a member, two years before the assignment. *Menagh* v. *Whitwell*, 52 N. Y. 146, is cited with approval.

QUASI CONTRACT — PAYMENT BY MISTAKE — DOCTRINE OF PRICE *v.* NEAL. — Plaintiff had indorsed certain paper for accommodation in the belief that it was negotiable, and that he was thus secured by certain property for which it had been given. The paper was discounted by the defendant bank, also in the belief that it was negotiable; and the other parties failing to meet it when due, plaintiff paid a part, and refused to pay the rest. The bank sued, and was defeated, on the ground that the paper was not negotiable. Plaintiff then sued the bank for the amount which he had already paid, basing his claim on the ground that he had paid under the mistake that he was secured by the property for which the paper was given. *Held*, that he could not recover. *Alton* v. *First Nat. Bank of Webster*, 32 N. E. Rep. 228 (Mass.).

The decision of this case is clearly right. Its interest comes from the fact that it is a decision in addition to that in the case of *Fort Dearborn Nat. Bank* v. *Carter, Rice, & Co.*, 152 Mass. 34, with which the Massachusetts court will be confronted when it is called on to pass again on a case like *Welch* v. *Goodwin*, 123 Mass. 171, or *Merchants' Nat. Bank* v. *Nat. Eagle Bank*, 101 Mass. 281. Holmes, J., in his opinion in the principal case, expressly states that so far as that case is concerned "it does not matter whether the mistake was a mistake of fact or of law." If the point that the mistake is one of law is waived, it is difficult to distinguish the principal case, where the plaintiff has paid in the faith that he is secured by collateral which goes with a note, from the case of the *Merchants' Nat Bank* v. *Nat. Eagle Bank*, where plaintiff paid in the be-

lief that it had deposits sufficient to cover the draft; or the case of *Welch* v. *Goodwin*, where the plaintiff paid in the belief that he was meeting the obligation which was really outstanding against him. The principle is the same as that of *Price* v. *Neal*. (See 4 Harvard Law Review, 497.) As between two parties whose equities are equal, the courts will not deprive a defendant of his legal advantage.

QUASI CONTRACT — RECOVERY OF EXCESSIVE FREIGHT. — A railroad company contracted with defendant that it would charge to all other shippers a certain rate double the charge on defendant, and would pay to him one half of this excess when collected. The consideration for the contract was a promise by defendant to build and maintain a system of pipe lines along the road. Plaintiff, in ignorance of this arrangement, paid freight to the company, which paid to defendant the amount agreed on. *Held*, that the contract between the company and defendant was void, as against public policy, and that plaintiff could recover, in an action for money had and received, the part of the excessive charge which defendant received, for the reason that it was "against good conscience" for defendant to retain this money. *Brundred* v. *Rice*, 32 N. E. Rep. 169 (Ohio).

The court evidently treated the arrangement between defendant and the company as a wrong to plaintiff, so that there was a constructive trust in favor of the latter on funds which defendant received under the contract. The difficulty with that view is that defendant never in fact received plaintiff's money. That was paid into the general funds of the company, where its identity was lost. Plaintiff could not possibly show that defendant received *his* money. Without proving this, it is submitted that no *res* can be shown for a constructive trust.

Another possible theory is submitted. Defendant and the company, having wronged plaintiff, were liable to an action of tort. But plaintiff has waived his right to bring an action of tort, and has elected to sue in money had and received for the proceeds of the tort received by defendant. It is clear that the sum paid to defendant was paid to him as the direct fruit of his tort, although it is not plaintiff's own money. Any objection on the ground of the form of action would seem very technical to-day. It seems no harder to allow "money had and received" in this case than to allow a plaintiff whose property has been converted to waive the tort and sue on a count for goods sold.

REAL PROPERTY — ADVERSE POSSESSION. — Where a strip of land was occupied for the statutory period under a mistake as to the true boundary line, and without any intention to claim title to any land not embraced within the original deed, *held*, that a title by adverse possession was not obtained. *King* v. *Brigham*, 31 Pac. Rep. 601 (Oregon).

The doctrine laid down by this case originated in *Brown* v. *Gay*, 3 Greenl. 126, which was followed in 33 Ala. 38; 28 Mo. 481; 39 Vt. 579; 34 Iowa, 148; and 35 Kan. 85; but see, *contra*, 8 Conn. 439; 30 Ohio St. 409; 31 Minn. 81; 73 Me. 105; 69 Ala. 332; 70 Mo. 372; and 22 N. Y. 170. It is submitted that the latter authorities are correct. There was, in fact, a claim of title to the actual land, though there would not have been except for a mistake of fact. It would follow from the principal case that adverse possession can be effective only if it is dishonest.

REAL PROPERTY — APPROPRIATION OF WATER RIGHTS — MEASURE OF DAMAGES. — In an action against the town of Randolph and others, for value of plaintiffs' water right taken by the towns under authority of a statute, *held*, that no reduction in damages should be allowed for the water which was returned to the stream by percolation, so as to become available for mill purposes. The damages to be assessed are not what the plaintiffs have suffered merely, but all that will arise in the future as well. The amount of water which may be returned in the future cannot be estimated. The defendants have the right to divert all the water, and may do so. Hence, damages are to be assessed on that basis. Allen, Knowlton, and Barber, JJ., *dissent*, on ground that if damages are assessed on the basis given, the plaintiffs will receive compensation for the loss of water which they actually will continue to use. *Proprietors of Mills* v. *Inhabitants of Randolph*, 32 N. E. Rep. 153 (Mass.).

REAL PROPERTY — LEASE VOID UNDER STATUTE OF FRAUDS — TENANCY FROM YEAR TO YEAR. — The Minnesota statute requires that all leases of one year or more, to begin *in futuro*, shall be in writing. Defendant agreed to occupy plaintiff's building for at least one year. He remained more than two years, paying rent monthly. After a month's notice to quit, the landlord brought action for possession. The tenant set up the parol lease in order to show that he was entitled to notice as under a holding from year to year. *Held*, that "at no time can a parol demise void under the Statute of Frauds be resorted to for purpose of ascertaining the duration of the term." *Johnson* v. *Alberton*, 53 N. W. Rep. 642 (Minn.).

It is submitted that though the agreement for a lease for years be not admissible against the lessor to show the number of years for which lessee is to hold, it is admissible to show whether or not there was a payment of rent with reference to a yearly holding; *i. e.*, whether a tenancy from year to year was created. Compare *Doe d. Rigge* v. *Bell*, 5 T. R. 471, and note to that case in 2 Smith's Lead. Cas.

The language of the court is inconsistent with *Doe d. Tilt* v. *Stratton*, 4 Bing. 446, where defendant entered under an agreement for a lease for seven years, and it was held that at the end of the seven years the contract itself gave defendant sufficient notice to quit.

REAL PROPERTY — WILLS — ADVANCEMENT. — A father gave property by deed and will to each of his children except the two plaintiffs, reciting in both deed and will that this was all he intended these children to take from his estate. As to the rest of his property, he died intestate. The defendants claimed that there was an implied devise to them of the residue. *Held*, that notwithstanding the words of exclusion, the undisposed portion of the estate should be divided among all the children, the gifts previously made being treated merely as advancements. *Phillips* v. *Phillips*, 20 S. W. Rep. 541 (Ky.).

REAL PROPERTY — WILLS — EXECUTORY DEVISE. — A testator devised a freehold estate to his son for life, and after his death to all children of his son who should reach twenty-one, in equal shares as tenants in common. By a subsequent clause, he directed that if the son's estate should be taken in execution for debt, it should cease, and the property should vest in the persons who would under the previous limitations be next entitled to it. The son's estate was taken in execution, and the only child who had reached twenty-one brought a bill, praying a declaration that she was absolutely entitled to the whole estate in fee. *Held*, that although the first limitation to the children, coming after the end of the life estate, must be a remainder, so that, being a contingent remainder, only those children could take who by reason of having reached twenty-one had vested interests at their father's death, yet the second limitation, since it cut short the father's life estate, was an executory devise, and the estate which vested in the one child who had reached twenty-one would open and let in all the children who attained twenty-one at any time hereafter. *Blackman* v. *Fysh*, [1892] 3 Ch. 209 (Eng.).

STATUTE — CONSTRUCTION — CORRELATIVE OBLIGATIONS WHICH ARE NOT CONTRACTS. — By Acts passed in 1867 and 1881, the Richmond Gas Company was required to supply gas to the public lamps in the parish of Richmond, and the charge for supplying such gas was fixed at a certain annual sum per lamp; the lamps to be lighted from sunset to sunrise, and the burners used to consume not less than a certain amount per hour. During the months of December, 1890, and January, 1891, in consequence of exceptional frost, the pipes became blocked with ice, and the supply of gas to the public lamps was insufficient. *Held*, that the relation between the parties was not a contractual relation, but that an absolute statutory obligation was imposed on each, and that the corporation of Richmond were bound to pay the fixed annual sum in respect of such lamps, notwithstanding the insufficiency of the supply of gas. *In re Richmond Gas Co. and Mayor, etc., of Borough of Richmond*, [1893] 1 Q. B. 56 (Eng.).

TORT — NUISANCE — DAMAGE TO REALTY. — *Held*, that there is a distinction between injuries which affect the air merely by way of noises and disagreeable gases, resulting in personal discomfort, and those which injuriously affect the land itself, or structures upon it. As to the former, each person living in society must submit to a degree of discomfort, depending in some measure upon the circumstances of his environment. As to the latter, the owner or occupant of land is entitled to enjoy it free from any direct injury which will appreciably affect its value. *Hennessey* v. *Carmony*, 25 Atl. Rep. 374 (N. J.).

The Supreme Court of New Jersey adopt, in this case, the distinction laid down by Lord Westbury in *Smelting Co.* v. *Tipping*, 11 H. L. Cas. 642 (S. C. 11 Jurist N. S. 785).

TRUSTS — RESULTING TRUST BECAUSE OF FIDUCIARY'S FRAUD. — A and B agreed to buy certain land in common, taking the title in the name of B's wife as trustee, and A gave B two negotiable bonds with which to pay for A's share. The vendor refused to accept the bonds; B then borrowed the necessary money from his wife, and paid cash for the land. Afterwards B sold the bonds in his wife's name, and turned over to her the money thus realized. *Held*, that the wife was trustee of the land for A; for although neither the bonds themselves nor the money netted by their sale was used in payment, still, in effect, the money paid was the product of the bonds, because the wife's

advance was made on the bonds as security, with the privilege of selling them for reimbursement. *Hill* v. *Pollard*, 32 N. E. Rep. 564 (Ill.).

It is submitted that the court could have made a shorter cut to its decision by saying simply that a fiduciary must not compete with his principal.

REVIEWS.

THE LAWS OF ELECTRIC WIRES IN STREETS AND HIGHWAYS. By Edward Quinton Keasbey, of the New Jersey Bar. Chicago: Callaghan & Co. 1892.

"IT is always interesting to observe the manner in which the courts deal with new inventions and apply old principles of law to new conditions," writes Mr. Keasbey (who graduated from Harvard Law School in 1871), in the preface to this really valuable book. Some idea of the rapid growth of the law on this subject may be gathered from the fact that Scott and Jarnagin, in their work on Telegraphs, written in 1868, refer to the rights of abutting owners against companies who erect poles and stretch wires along the roads and streets as one of speculation rather than practical interest, and cite no cases; and as late as 1883 there had been few, if any, decisions upon the question. The chapters treating of the conflict of authority upon the rights of abutting owners are the most useful and interesting of Mr. Keasbey's book. On the one hand, the Supreme Courts of Missouri, Massachusetts, and Louisiana have held that the electric telegraph wire is not a new burden upon the land adjoining the highway, on the ground that the telegraph is merely a new means of using the old easement of communication, — an analogy which seems very artificial. On the other hand, the Supreme Courts of New York, New Jersey, Minnesota, Illinois, Ohio, Virginia, Maryland, and Mississippi, and such writers as Lewis and Dillon, maintain that the telegraph poles and wires are an additional burden, for they form no part of the public highway, and, as a means of transmitting intelligence, are so wholly different from the post-boy and stage-coach that they could not have been contemplated by the landowner at the time of dedication or condemnation. Mr. Keasbey says it is not yet safe to predict which of these two views will finally prevail. The old distinction with respect to the title to the land has been shown to be of no value; and future judicial opinion, following the rule laid down by the New York Court of Appeals in the Elevated Railroad Cases, will be based, it is to be hoped, on the question whether the privileges of the abutting owner are affected, and the further question, What is the scope of the uses and purposes of a public street?

Whether the electric street railway will occupy the legal position of the horse and cable railway is still doubtful; but the most recent decisions would lead one to answer in the affirmative. Mr. Keasbey thinks that it might tend to a reconciliation of the cases, and the adoption of a uniform rule, if the question of new burden were, as Chief Justice Campbell, of Michigan, suggests, left on one side, and attention were directed to the practical question mentioned above, — whether the rights and privileges of abutting owners were injured by the operations of the railway.